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May 19, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0310

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

*I. Background*

*A. The Energy Employees Occupational Illness Compensation Program Act*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept

a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

#### B. Procedural Background

The Applicant was employed as a maintenance mechanic at DOE's Paducah Gaseous Diffusion Plant (the plant) for approximately five years, from 1975 to 1980. The Applicant filed a Subpart B application with the DOL, claiming melanoma. The Applicant also filed a Subpart D application with the OWA, requesting physician panel review of melanoma. The DOL sent the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant chose to proceed with her Subpart D claim prior to the completion of the NIOSH dose reconstruction report, and the OWA forwarded her case to the Physician Panel. Record at 16.

The Physician Panel rendered a negative determination on the claimed illness. The Panel determined that melanoma is associated with intense exposure to ultra-violet light and is not associated with radiation. The Panel stated that the Applicant's condition is consistent with sun damage to the skin.

The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal. In her appeal, the Applicant contends that the Panel did not understand the nature of her job at the plant. In describing her duties at the plant, the Applicant stated:

My job was to remove tubes from converters ... these tubes contained UF<sub>6</sub> powder, which would get on my skin after we hosed down the tubes with water - particularly on the area of my leg where the melanoma was located ... my pants leg always stayed wet from the yellow water.

Applicant's Appeal Letter. The Applicant further stated that the part of her leg where the melanoma was located was never exposed to excessive sunlight.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The record does not contain support for the Panel's finding that the Applicant's melanoma was consistent with sun exposure. The Applicant's melanoma was on her inner right thigh. The only reference to sun exposure in the Applicant's records is a physician's note which states that the Applicant had "sun change on her distal upper and lower extremities." Record at 54. No reference is made to sun exposure on any other part of the body. Because the record does not support the Panel's finding that sun exposure was the cause of the Applicant's melanoma, further consideration of the application, including the Applicant's description of her exposures and the Panel's view that melanoma is not associated with radiation, is warranted.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0310 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The Panel's finding that the Applicant's melanoma is consistent with sun damage is unsubstantiated by the Applicant's record. Reconsideration is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 19, 2005